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Congress of the United States

House of Representatives

Washington, DC 20515-2107

March 11, 2004

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The Honorable Nils J. Diaz
Chairman
Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD, 20852

Dear Chairman Diaz:

I am writing regarding the Commission's recent decision to refuse the Blue Ridge Environmental Defense League (BREDL) access to safeguards information that relates to its petition to oppose the use of four lead test assemblies of mixed oxide fuel in one of Duke Energy Corporation's Catawba nuclear reactors, even though the BREDL personnel who wish to review these materials have the appropriate clearances for access to such information. By contrast, the Commission appears to have granted Nuclear Energy Institute (NEI, the trade association representing the nuclear industry) personnel blanket access to the very same safeguards information. I am concerned that this decision shuts the public out of all nuclear security matters while allowing nuclear industry lobbyists unfettered access to the NRC's decision-making process. I ask that you reverse this unwise ruling.

I have long been concerned that the Commission appears to use a double-standard when it comes to nuclear safety and security, by including the nuclear industry while preventing the public from participating in the Commission's regulatory process. On December 9, 2002, I sent then-Commissioner Meserve a letter about the Commission's closed-door meetings with NEI regarding its nuclear security regulations which indicated that the industry would have the opportunity to review and edit NRC proposals before they became public, while other non-industry stakeholders and security experts were barred from providing input at all (see http://www.house.gov/markey/Issues/iss_nuclear_ltr021209.pdf). On March 3, 2004, I, along with Congressman John D. Dingell (D-MI) sent you a letter asking numerous questions about the Commission's latest plans to dramatically weaken fire safety regulations in accordance with industry wishes, including questions related to the Commission's decision to promulgate an interim and final rule simultaneously leaving almost no time for public comment (see http://www.house.gov/markey/Issues/iss_nuclear_ltr040303.pdf).

In this particular case, Duke Energy Corporation, which plans to receive four mixed-oxide (MOX) fuel lead test assemblies for testing in its Catawba 2

nuclear reactor, has applied for an exemption from certain NRC security requirements concerning the storage of plutonium. BREDL (as assisted by the Union of Concerned Scientists, UCS) is opposing the request, and requested access to the NRC Design Basis Threat (DBT) Orders for both power reactors and Category 1 facilities so that it could properly analyze Duke Energy's request to be exempt from some of the latter requirements. I am informed that both Diane Curran, BREDL's attorney, and Dr. Edwin Lyman of UCS have appropriate security clearances, and also signed non-disclosure agreements governing unclassified safeguards information. After the NRC Atomic Safety and Licensing Board (ASLB) approved their request for access to the power reactor DBT for radiological sabotage (see Attachment 1), NRC staff evidently appealed the decision and the Commission overturned the ASLB ruling (see Attachment 2). According to the Commission's ruling, it opposed granting BREDL and UCS personnel to this information because BREDL did not "need to know" the information in question and did not show that obtaining access to the information was "indispensable" to its case. In other words, the Commission believes that BREDL should be able to challenge the ability of Duke Energy's security arrangements for MOX fuel storage to meet NRC standards without knowing what those standards are.

By contrast, on June 19, 2003, the Commission granted blanket "need to know" determinations to NEI "employees, agents or contractors" for access to the same power reactor security standards it refused BREDL access to for purposes of "efficiently and expeditiously obtaining industry-wide comments on Commission policy issues involving nuclear facility and materials security" (see Attachment 3). The Commission evidently found that NEI's need to have access to this information in order to develop "generic responses to various Commission security initiatives" was indispensable, while BREDL's need to have access to it in order to develop a specific response to an industry request to be exempt from certain other security initiatives was not.

I am concerned that by acceding to the nuclear industry for special access to the Commission, its staff, and ongoing regulatory proceedings, while thwarting every attempt made by non-industry groups, stakeholders or experts to evaluate the adequacy of Commission security requirements and industry compliance with such requirements, is undermining the independence of the Commission. Consequently, I ask for your prompt assistance in answering the following questions:

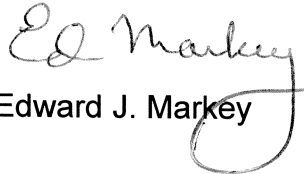
- 1) Why did the Commission grant NEI's request but deny BREDL's?
- 2) How does the NEI activity of using safeguards information to develop "generic responses to various Commission security initiatives" meet the same "indispensability" standard cited by the Commission in its ruling that overturned the ASLB decision granting BREDL access to this information?
- 3) Now that the Design Basis Threat Orders have been issued, each nuclear reactor must prepare a new site-specific security plan. Why does NEI

continue to need access to the safeguards information in order to prepare "generic" responses?

- 4) Why don't you consider BREDL's need to compare Duke Energy's security plan with NRC security regulations to meet the "need to know" and "indispensable" standard?
- 5) In the past 5 years, has NRC staff or the Commission itself ever refused a request for access to safeguards or otherwise classified material by the NEI? Please list all such requests, including the date the request was made, the nature of the request, the NRC staff or Commission decision regarding the request, and if the request was denied, the basis for the denial.
- 6) In the past 5 years, has NRC staff or the Commission itself ever granted a request for access to safeguards or otherwise classified material to an appropriately cleared member of the public, stakeholder group (such as BREDL) another other non-industry organization (such as UCS)? Please list all such requests, including the date the request was made, the nature of the request, the NRC staff or Commission decision regarding the request, and if the request was denied, the basis for the denial.

Thank you very much for your attention to this important matter. Please provide your response no later than Friday April 2, 2004. If you have any questions or concerns, please have your staff contact Dr. Michal Freedhoff of my staff at 202-225-2836.

Sincerely,


Edward J. Markey